

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Revitalization of the AM Radio Service)	MB Docket No. 13-249
)	

**OPPOSITION OF THE NATIONAL ASSOCIATION OF BROADCASTERS
TO THE PETITION FOR RECONSIDERATION OF PROMETHEUS RADIO PROJECT AND
OPPOSITION TO MOTION FOR EXTENSION OF TIME**

I. BACKGROUND AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby opposes the Petition for Reconsideration of the Prometheus Radio Project in the above-captioned proceeding,² which seeks reconsideration of the Commission's recent Order providing AM broadcasters more flexibility to locate translators.³ We also oppose Prometheus's Motion for Extension of Time to submit a reply to oppositions to its Recon Petition.⁴

The Recon Petition follows Prometheus' earlier filing of a Petition for Stay of the same Order. On April 6, 2017, NAB submitted an opposition to the Stay Petition on procedural grounds, explaining that it was filed prematurely pursuant to a Commission rule that requires a pending petition for reconsideration before good cause can be shown to stay a

¹ NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² Petition for Reconsideration of Prometheus Radio Project, MB Docket No. 13-249 (Apr. 10, 2017) (Recon Petition). Petition of Prometheus Radio Project (Prometheus) for Emergency Partial Stay and Processing Freeze Pending Review of Petition for Reconsideration, MB Docket No. 13-249 (Apr. 3, 2017) (Stay Petition).

³ *Revitalization of the AM Radio Service*, Second Report and Order, MB Docket No. 13-249 (rel. Feb. 24, 2017) (Order).

⁴ Motion for Extension of Time, Prometheus Radio Project, MB Docket No. 13-249 (filed May 11, 2017) (Motion).

rule.⁵ On April 17, 2016, following Prometheus' filing of the Recon Petition, NAB submitted a Further Opposition to the Stay Petition that addressed the substantive flaws of Prometheus' request for stay.⁶

The arguments that Prometheus presents in the Recon Petition largely rehash those in the Stay Petition, to which NAB has already responded. Therefore, NAB herein refrains from repeating in detail all the evidence and arguments support in our Further Opposition, and respectfully refers the Commission to that pleading.

The Commission first allowed AM radio stations to use FM translators in 2009, but confined placement of a translator to the lesser of a station's 2 mV/m daytime contour or a 25-mile radius centered at the transmitter site.⁷ In time, these limits proved overly restrictive for many AM stations, including stations that collocate their translator with an AM directional antenna that produces a very small 2 mV/m contour.⁸ Thus, in 2015, the Commission proposed to relax these limits to the greater of the 2 mV/m daytime contour or 25-mile radius, subject to a proposed 40-mile maximum radius from the station's transmitter.⁹ The Commission approved this change in the Order, but after reviewing the record, eliminated the 40-mile cap as unnecessary because the 2 mV/m contour already serves as an

⁵ Opposition of NAB to the Petition of Prometheus Radio Project for Emergency Partial Stay and Processing Freeze Pending Review of Petition for Reconsideration, MB Docket No. 13-249 (Apr. 6, 2017) (NAB Opposition); 47 C.F.R. § 1.429(k).

⁶ Further Opposition of NAB to the Petition of Prometheus Radio Project for Emergency Partial Stay and Processing Freeze Pending Review of Petition for Reconsideration, MB Docket No. 13-249 (Apr. 17, 2017) (NAB Further Opposition).

⁷ *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642 (2009) (2009 Translator Order).

⁸ *Revitalization of the AM Radio Service*, Notice of Proposed Rulemaking, 28 FCC Rcd 15221 (2013) (2013 Notice).

⁹ *Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 30 FCC Rcd 12145, 12173-74 (2015) (Further Notice).

appropriate boundary for translator service.¹⁰ The Commission began accepting applications from AM broadcasters seeking to relocate translators as of April 10, 2017.¹¹

Below, NAB demonstrates that Prometheus has failed to justify reconsideration of the Order. We explain that Prometheus incorrectly claims the Order was not a logical outgrowth of the Further Notice because the Commission provided ample notice of its intention to relax the translator placement criteria. We also point out that, given the data now available about the applications filed to relocate translators pursuant to the Order, Prometheus's claims that the Order will cause irreparable harm to LPFM stations are groundless.

II. OPPOSITION TO MOTION FOR EXTENSION OF TIME

As a preliminary matter, NAB opposes Prometheus' request for additional time to file a reply to oppositions to its Recon Petition. Prometheus offers two reasons for its request. First, it states that its counsel is engaged in several ongoing proceedings, one of which involves time sensitive issues related to a stay request.¹² What Prometheus fails to mention, however, is that the referenced stay proceeding is of its own making.¹³

Second, Prometheus complains that additional time is needed to consult with its experts about the technical and engineering issues involved in this proceeding, and that Memorial Day weekend will limit the availability of support staff.¹⁴ This argument is unpersuasive. Although some 200 AM radio broadcasters have filed applications to relocate

¹⁰ Order at ¶¶ 3-4.

¹¹ Public Notice, *Media Bureau Announces Notice of Effective Date of Rule Change Adopted in Second Report and Order in Revitalization of the AM Radio Service*, DA 17-255 (Mar. 16, 2017).

¹² Motion at 1-2.

¹³ Petition for Stay Pending Judicial Review filed by Free Press, Office of Communication, Inc. of the United Church of Christ, Prometheus Radio Project, Media Mobilizing Project, Media Alliance, National Hispanic Media Coalition and Common Cause, MB Docket 13-236 (May 10, 2017) (UHF Discount Stay Petition).

¹⁴ Motion at 2.

translators since the effective date of the Order, as discussed below, NAB's understanding is that only one such application sought to move a translator beyond the 40-mile limit that is the crux of Prometheus' Recon Petition. Assuming Prometheus does not intend to introduce any new arguments to the proceeding, NAB finds it hard to believe that Prometheus requires an additional two weeks to consider the potential impact of this lone request on LPFM service.

Finally, we note that Prometheus filed its Recon Petition on April 10, 2017, or 40 days before oppositions are due, and 51 days before Prometheus must file its reply. Moreover, Prometheus was provided a generous head-start on preparing its filing, given that notice of its Recon Petition was not filed in the Federal Register until May 4, 2017, or 24 days later. Prometheus was afforded ample notice and opportunity to prepare its reply, and does not offer any meaningful rationale for further delaying Commission action in this proceeding. We also note that this is not Prometheus' first request for an extension of time based on an intervening holiday.¹⁵ Memorial Day is a one-day, well-calendared holiday that Prometheus had ample time to take into account, especially given the long lead time before the filing deadlines were even established. For these reasons, NAB opposes Prometheus' request for additional time to file its reply to oppositions to the Recon Petition.

III. PROMETHEUS FAILS TO JUSTIFY RECONSIDERATION OF THE ORDER

Prometheus claims that reconsideration of the Order is warranted because the Commission's decision was not a logical outgrowth of the proposal in the Further Notice, as required under the Administrative Procedures Act (APA).¹⁶ Prometheus also asserts that the

¹⁵ Motion for Extension of Time of Prometheus Radio Project and the Media Mobilizing Project, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (Jan. 4, 2017) (seeking an extension due to Inauguration Day).

¹⁶ Pub. L. 79-404, 60 Stat. 237 (1946); 5 U.S.C. § 553.

Commission failed to account for the potential harm the Order will have on LPFM service. Prometheus argues that “countless” LPFM stations could be “severely limited” under the Order, as relocated translators are permitted to “box-in” LPFM stations that may need to relocate in the future if their facility becomes unavailable.¹⁷

A. The Order was a Logical Outgrowth of the Further Notice

Pursuant to the APA, notice of a proposed rule must include “either the terms or substance of the proposed rule or a description of the subjects and issues involved,”¹⁸ and an agency must provide interested persons “an opportunity to participate” in the rulemaking proceeding.¹⁹ The final rule need not be identical to the proposed version, but it must be “a logical outgrowth” of the proposed rule.²⁰

Prometheus contends that eliminating the 40-mile cap from the rule was a significant departure from the Further Notice that will have a profound impact on LPFM stations and could not have been anticipated by LPFM parties.²¹ Prometheus thus argues that LPFM parties lacked an opportunity to comment on the final rule. However, as discussed in NAB’s Further Opposition, the Further Notice provided ample notice of this minor change to the proposed rule.²² We noted that the Commission specifically determined in the Further Notice that allowing AM stations more flexibility to locate translators would serve the public interest.²³ The Commission also relied on a well-developed record of obstacles caused by the “lesser of 25 miles or 2 mV/m” standard, and explicitly sought comment on the potential

¹⁷ Recon Petition at 2, 9-10.

¹⁸ 5 U.S.C. § 553(b).

¹⁹ *Id.* at § 553(c).

²⁰ *PSC of the Dist. of Columbia v. FCC*, 906 F.2d 713, 717-718 (D.C. Cir. 1990) *citing* *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985).

²¹ Recon Petition at 8.

²² NAB Further Opposition at 4-6.

²³ *Id.* at 4 *citing* Further Notice, 30 FCC Rcd at 12174.

harms of its proposal.²⁴ Although Prometheus did not respond at the time, many commenters did, with the overwhelmingly majority supporting the Commission's approach. Even REC Networks, a leading LPFM advocacy group, supported the Commission's approach.²⁵

Prometheus did express its concerns in a letter filed late in the proceeding,²⁶ to which the Commission specifically responded in the Order. The Commission stated that deleting the 40-mile limit based on the record "was entirely foreseeable."²⁷ The Commission also rejected Prometheus' claims that eliminating the 40-mile limit will "destroy" the concept of limiting translator service to a station's core service area,²⁸ noting its earlier findings that the 2 mV/m contour effectively defines an AM station's primary service area.²⁹ Thus, the Commission correctly determined that the final rule was a foreseeable logical outgrowth of the proposal in the Further Notice. Given Prometheus' letter detailing its concerns, and the Commission's direct response in the Order, Prometheus' complaints that the Commission did not provide notice and comment of the final rule are specious.

²⁴ Further Notice, 30 FCC Rcd at 12174.

²⁵ Comments of REC Networks, MB Docket No. 13-249 (Mar. 18, 2016); Opposition to Prometheus Radio Project Motion for Emergency Stay, MB Docket No. 13-249 (Apr. 5, 2017).

²⁶ Letter from Andrew Jay Schwartzman, Counsel for Prometheus Radio Project, to Chairman Ajit Pai, Commissioner Mignon Clyburn, and Commissioner Michael O'Rielly, MB Docket No. 13-249, at 2 (Feb. 16, 2017) (Prometheus Ex Parte Letter).

²⁷ Order at ¶ 4 n. 21 citing *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 951-52 (D.C. Cir. 2004) ("Agencies are free – indeed they are encouraged – to modify proposed rules as a result of comments they receive.").

²⁸ Recon Petition at 7.

²⁹ Order at ¶ 4.

B. Prometheus' Claims that the Order Will Cause Irreparable Harm to LPFM Service are Erroneous

Prometheus claims that the Order is arbitrary and capricious because it fails to address the allegedly broad harm it will have on LPFM stations,³⁰ and violates the Local Community Radio Act by favoring commercial AM broadcasting over noncommercial LPFM stations.³¹ In the Stay Petition, Prometheus offered little more than speculation about such harm, claiming that relocated translators “inevitably” will “box in” LPFM stations.³² NAB disputed this assertion, stating that Prometheus could not possibly predict how many – if any – LPFM stations will need to move in the future and be unable to find a new facility because of a translator presence. Nor could it predict that relocated translators would be any more preclusive than their current locations.³³

In the Recon Petition, Prometheus attempts to bolster its position with statistics on the number of cross-service translators that could seek to relocate under the Order. Prometheus claims that more than 1,600 AM stations have a daytime contour that extends more than 40 miles from the station, each with LPFM stations in their midst that could be impacted by a translator move.³⁴ However, now that data about the actual applications filed to relocate translators is available, it is clear that Prometheus' concerns are entirely unfounded.

It is NAB's understanding that approximately 125 AM broadcasters applied to relocate their translator when the window opened on April 10th, and since that date the total

³⁰ Recon Petition at 11-13.

³¹ *Id.* at 13-16; The Local Community Radio Act of 2010, Pub. L. No. 111-371, 124 Stat. 4072 (2010) (LCRA).

³² NAB Further Opposition at 7-8.

³³ *Id.*

³⁴ Recon Petition at 9.

has risen to above 200.³⁵ Of this entire group applicants, exactly one AM broadcaster sought to move a translator beyond the 40-mile limit proposed in the Further Notice that is the crux of Prometheus' objections.³⁶ NAB submits that only one such application hardly qualifies as the broad irreparable harm that Prometheus breathlessly claimed the Order would cause to LPFM stations. Prometheus' concerns that "countless" LPFM stations would be "severely limited" by the Order³⁷ are simply wrong. The Order will not cause LPFM stations to be boxed in, or negatively impacted in any way. To the contrary, the real-world outcome of the Order only serves to bolster the Commission's analysis that its approach would provide much needed flexibility to some AM radio broadcasters without affecting other services, including LPFM.³⁸

Prometheus also repeats its claims that the Order contradicts the goals of the LCRA,³⁹ by elevating commercial radio over noncommercial LPFM service, and causing a "dramatic and adverse effect" on LPFM listeners.⁴⁰ However, as discussed in NAB's Further Opposition, the Order does no such thing. Prometheus's genuine frustration is that LPFM service and FM translators are equal in their secondary status under the LCRA and the Commission's rules, despite its self-serving belief that LPFM stations provide a worthier public service than translators.⁴¹ Prometheus misconstrues the Order as somehow

³⁵ Given the first-come first-served nature of the Order, it is reasonable that the vast majority of stations interested in relocating a translator filed their application promptly.

³⁶ REC Networks noted that many of the FM translator applications filed in the 2016 "250-mile" modification windows were in areas where an LPFM station was not impacted. REC Networks Opposition at 2.

³⁷ Recon Petition at 2.

³⁸ Order ¶ 4 n.21. Order ¶ 4 n.21.

³⁹ Recon Petition at 13-16.

⁴⁰ *Id.* at 14-15.

⁴¹ NAB Further Opposition at 16.

“demeaning” LPFM service,⁴² when all it does is provide AM radio broadcasters a bit more flexibility to place existing translators. Prometheus discounts the valuable local service provided by AM radio broadcasters, and ignores the public service benefits of translators, which have allowed hundreds of stations to initiate nighttime service, provide listeners with a better signal, and add more community-oriented programming.⁴³

NAB sees no need to denigrate LPFM service. We agree with the Commission that both AM and LPFM broadcasters offer valuable service: “[W]e expect that many if not most of the stations benefiting from the amended rule will be smaller Class C and D AM stations . . . that also share with the LPFM service a focus on community-based programming.”⁴⁴

IV. CONCLUSION

For the reasons described above, NAB respectfully requests that the Commission reject Prometheus’s Recon Petition, and dismiss Prometheus’ Motion for an Extension of Time to file a reply to oppositions to the Recon Petition.

Respectfully submitted,

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May 19, 2017

⁴² Recon Petition at 16.

⁴³ NAB Further Opposition at 8.

⁴⁴ Order ¶ 4 n.21.

CERTIFICATE OF SERVICE

I, Larry Walke, do hereby certify that a copy of the foregoing Opposition to Petition for Reconsideration was served, this 19th day of May, 2017, to the following:

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